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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOHN STANFA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does not the *Kastigar* prohibition on indirect and derivative use of immunized testimony include non-evidentiary use?

II. Does not the *Kastigar* prohibition on indirect and derivative use of immunized testimony include the unusual form of indirect use seen here where the Petitioner was immunized during alleged on-going RICO activity as a ploy to disrupt that activity and his immunized testimony was thereafter disseminated by Petitioner himself to his associates — as was intended by the investigators — and the associates' subsequent tainted out-of-court declarations were then used as trial evidence against Petitioner, the effect of such self-dissemination being a point left open in *Pillsbury Co. v. Conboy*?

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Appendix F — Memorandum Of The United States District Court For The Eastern District Of Pennsylvania Dated July 17, 1996 And Filed July 18, 1996 ..... 16a

The Petitioner John Stanfa respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit which was entered in the above-entitled case on July 28, 1998.

OPINIONS BELOW

The unreported Opinion and Judgment of the United States Court of Appeals for the Third Circuit, entitled *United States v. John Stanfa*, is included in the appendix at pages 2a-12a.

The district court's Memorandum dated July 17, 1996 denying the *Kastigar* motion and the relief anticipated by it is included in the appendix at pages 16a-49a.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Petitioner John Stanfa (hereinafter "Stanfa" or "Petitioner") was indicted on March 16, 1994 by a federal grand jury in the Eastern District of Pennsylvania, along with numerous co-defendants, for RICO and related offenses. The predicate offenses included various alleged forms of organized criminal activity.

Several pretrial motions were brought including, as here pertinent, Stanfa's *Kastigar* motion filed March 29, 1995.[1] The government conceded that a *Kastigar* hearing was required. By order dated June 30, 1995 the court scheduled the *Kastigar* hearing for post-trial consideration. Stanfa's motion for reconsideration (seeking a pretrial hearing) was brought before the court on August 22, 1995 which was denied on September 15, 1995.[2]

The indicted defendants were divided into two groups. Stanfa stood trial with the first group in October, 1995 and was convicted on the indictment.

In May, 1996 the trial court conducted a *Kastigar* hearing at which both the government and Stanfa presented evidence. The court ultimately ruled that the government had sustained its *Kastigar* burden but did not directly address the principal issues of non-evidentiary use and effect of self-dissemination

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1. *Kastigar v. United States*, 406 U.S. 441 (1972).

2. Stanfa took a pretrial direct appeal to the United States Court of Appeals for the Third Circuit as well as mandamus seeking a pretrial *Kastigar* hearing. The court of appeals denied the mandamus petition and the direct appeal was withdrawn by Stanfa without prejudice to his right to appeal the same issues from judgment of conviction. The appellate rulings on these pretrial matters are not challenged here.

(16a). Stanfa was sentenced on July 9, 1996 to a term of life imprisonment.

Timely notice of appeal to the United States Court of Appeals for the Third Circuit was filed on July 16, 1996. Following briefs and oral argument a panel of the court affirmed judgment of conviction, rejecting Stanfa's *Kastigar* arguments (2a).

By order dated November 17, 1998 Mr. Justice Souter extended the time for this petition for certiorari to and including February 26, 1999 (13a).

STATEMENT OF THE FACTS

In the early 1990's the federal government commenced an investigation of Stanfa and others premised on the belief that Stanfa was the boss of the local mafia crime family. The investigative approach employed a federal "task force" which pooled multi-jurisdictional investigative efforts and information towards the objective of bringing a federal prosecution.

The elements of the task force were federal authorities, the Pennsylvania Attorney General's Office, Philadelphia District Attorney's Office, the Philadelphia police and, to a lesser extent, New Jersey state authorities, including the state prosecutor's office and state police. The New Jersey authorities were not active participants in the Stanfa task force investigation before the Spring, 1994. It was not until 1994 — after Stanfa was compelled to give several days of immunized testimony before a New Jersey state grand jury — that the State of New Jersey committed itself to the unitary approach represented by the task force methodology.

The federal task force investigation and the New Jersey investigation had proceeded on parallel tracks with minimal

crossover throughout the Fall, 1993. According to the evidence at the *Kastigar* hearing, the agencies did not cooperate with each other at first.

By September, 1993 the federal task force had engaged in almost two years of active investigation and had developed electronic surveillance evidence, informers and other sources of evidence. The New Jersey investigation had proceeded similarly.

The New Jersey State Attorney, Frederick DeVesa, elected in September, 1993 to embark on an investigative technique which appears unprecedented.[3] With notice to federal authorities, and over their objections, Stanfa was subpoenaed before a New Jersey investigating grand jury and granted New Jersey statutory immunity. He was compelled to testify about the very matters that — that is, ongoing enterprise activity — were then under investigation both by federal and state sovereigns, i.e. the activities of the mafia family.

Stanfa proved to be a begrudging, uncooperative grand jury witness during his four days of grand jury examination. His testimony was largely exculpatory and failed to directly implicate alleged subordinates.[4] An "encapsulated" team of New Jersey prosecutors/investigators — that is, a team having access to the testimony who were not to disseminate it to others — was unable to elicit anything "substantial" from him. Based on the uncooperative tenor of his answers, the encapsulated

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3. Stanfa called General DeVesa, now Judge DeVesa, as a defense witness at the *Kastigar* hearing. It appears that the decision to immunize Stanfa was largely influenced by a police desire to use immunity to disrupt the functioning of the criminal enterprise.

4. Stanfa's immunized testimony was, by agreement between the parties, placed under seal in the files of the court of appeals.

team concluded that Stanfa would not be an effective witness against his subordinates, a conclusion that, by necessity, had to have been influenced by the immunized testimony.

Stanfa's testimony was encapsulated in the sense that only that team knew of its contents. But then an event occurred which was directly contrary to the "encapsulization" plan and, at least facially, in direct contradiction of the non-evidentiary use doctrine of the *Kastigar* case. Negotiations began between federal prosecutors and the *encapsulated state prosecutors* (i.e., the tainted prosecutors) to merge their respective Stanfa investigations and, in particular, for New Jersey to provide its investigative work product to the federal government. Those negotiations led to merger and the ensuing federal indictment was a blend of federal and New Jersey state investigative work product. Stanfa claimed below that the new-found cooperation between state and federal investigators was a "non-evidentiary use" of the immunized testimony.

At the *Kastigar* hearing in the lower court, Stanfa presented evidence tending to show that the New Jersey authorities had intended to disrupt organized crime by the grant of immunity. Leading questions were put to Stanfa suggesting a leak in the alleged enterprise. Inevitably, he would have discussed the questions and answers with his associates, as in fact happened. The proffer of witness Martines and Pagano showed the dissemination of Stanfa's testimony, its discussion among the enterprise members both contemporaneously (the organized crime activity was monitored for almost 6 months after the grant of immunity, before arrests were made) and during trial preparation, discussion about the immunized testimony with Stanfa's lawyers and, in the case of Pagano, how a police report relevant to *Kastigar* issues had been falsified.

Two affidavits from Donald F. Manno, one of Stanfa's lawyers at the time, likewise showed dissemination and discussion, as well as post-immunity coordination of New Jersey and federal investigations. Manno spelled out how the grand jury testimony was used by him in defense preparation, including disclosure of its contents to alleged enterprise members.

Stanfa himself made a written declaration pursuant to *Simmons v. United States*, 390 U.S. 377 (1968). The government conceded the correctness of this declaration for purposes of argument on the merits. Stanfa's declarations spelled out his understanding that he was free to discuss his immunized testimony, nobody said he was not; he described his dissemination of his testimony to his principal lawyer (co-defendant Sal Avena) and associates; he explained how the immunity affected his plea bargaining and his decision not to testify; and, likewise how it influenced his own post-immunity words and deeds. Stanfa made further particularized showings that the government had failed to prove independent source for the out-of-court declarations, used in evidence by the government, of the very co-conspirators who had been exposed to the immunized testimony via Stanfa's dissemination.

REASONS FOR GRANTING THE WRIT

Stanfa was compelled to testify under a grant of use and derivative use immunity sought by the New Jersey State Attorney General and granted by the New Jersey Superior Court. In *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964) this court held that state ordered immunity of this type protects the immunized declarant in not only in state proceedings but federal proceedings as well:

> [T]he constitutional rule [is] that a state witness may not be compelled to give testimony which may be

> incriminating under federal law unless the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him. *Id.*, at 79, n.18. (Bracketed material added.)

This immunity is "use and derivative use" as distinguished from "transactional" immunity. Both are said to supplant the Fifth Amendment privilege and, in a sense, are no different than the rack and the screw. One can be compelled to talk on pain of punishment for refusal.

In *Kastigar v. United States*, 406 U.S. 441 (1972) this Court upheld against constitutional challenge a "use and derivative use" immunity statute. Opponents of the statute claimed only transactional immunity would pass constitutional muster. It was in this setting that the Court upheld use and derivative use but insisted upon strong safeguards, particularly procedural safeguards. Immunized testimony cannot be used directly or indirectly against the declarant. The procedure to safeguard this right is as important as the right itself.

Kastigar contemplates a two part procedure. The first is an evidentiary proceeding, triggered by a defendant's threshold showing under *Kastigar* and *Murphy,* at which the government must meet a high evidentiary burden of demonstrating lack of taint *and* that its evidence is from independent sources including negation of the non-evidentiary use of the immunized testimony in its investigation.

This is not to be confused with simply showing non-access to immunized testimony. The burdens are different. *United States v. North*, 910 F.2d 843, 854 (D.C. Cir. 1990), *modified on rehearing*, 920 F.2d 940 (D.C. Cir. 1990) (*en banc*). "Independent source" means just that. The evidence must be wholly independent of the immunized testimony.

The *Kastigar* burden is heavy:

> [A person afforded use and derivative use immunity] is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities . . .
>
> * * *
>
> [The prosecution's] burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony. 406 U.S. at 460.

In the years following *Kastigar* there have been identified three separate potential "uses" or "fruits" that must be examined after an immunized person is prosecuted:

Direct Use. This is the most obvious. It is where the words of the immunized declarant are used in evidence against him.

Indirect Use. This is where compelled testimony is not used directly but results in the presentation of other evidence against the accused. For example, the immunized testimony might be used in a search warrant directed to a third party and the evidence seized from that party would be used against the accused.

Non-Evidentiary Use. Most courts tend to define this use by example: assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning the presentation of evidence and otherwise using the immunized testimony in subtle ways to advance the investigation and further the case against the accused.

Non-Evidentiary Use

The "Non-Evidentiary use" doctrine is critical in the present case. Petitioner suggests that, on this record, both federal and New Jersey authorities made no serious effort to avoid non-evidentiary use when they merged their respective investigations following Stanfa's immunized testimony.

Courts have recognized the prohibition on non-evidentiary use of immunized testimony, although several circuits have retreated from this rule in recent years. *See United States v. North*, 910 F.2d 843, 854 (D.C. Cir. 1990), *modified on rehearing*, 920 F.2d 940 (D.C. Cir. 1990) (*en banc*) (government's use of defendant's immunized testimony to refresh the recollection of a witness is impermissible); *United States v. Mapelli*, 971 F.2d 284, 287, 288 (9th Cir. 1992) (government's use of defendant's immunized testimony to formulate trial strategy is impermissible); *United States v. Semkiw*, 712 F.2d 891, 895 (3d Cir. 1983) (government's use of defendant's immunized testimony in preparation of a case is impermissible); *United States v. Pantone*, 634 F.2d 716, 721 (3d Cir. 1980) (recognizing prohibition on non-evidentiary use of immunized testimony); *United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) (prohibited use of immunized testimony include "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy"); *United States v. Pelullo*, 917 F. Supp. 1065, 1074, 1075 (D. N.J. 1995) (government's use of defendant's immunized testimony to establish probable cause and to secure a search warrant is impermissible); *United States v. Smith*, 580 F. Supp. 418 (D. N.J. 1986) (non-evidentiary use of defendant's immunized testimony is impermissible); *United States v. Hossbach*, 518 F. Supp. 759 (E.D. Pa. 1980), *aff'd w/o op.*, 649 F.2d 860 (3d Cir. 1981) (non-evidentiary use of defendant's immunized testimony is impermissible).

Petitioner claims that his immunized testimony influenced New Jersey prosecutors to provide their investigative work product to the federal government. Petitioner claims all such work product was tainted due to that influence and it was the obligation of the government — at the *Kastigar* hearing — to prove that the turn-over decision of New Jersey officials had not been influenced by the immunized testimony. Their turn-over decision was a "non-evidentiary use" of the immunized testimony. Both the district court and the court of appeals gave mere lip service to the impact of *Kastigar* here. The rationale of their holdings is a cramped view of the non-evidentiary use doctrine. Certiorari should be granted to consider this important point.

Self-Dissemination By Petitioner

The impact immunized testimony may have on declarants was a major contributing factor in the reversal of Oliver North's conviction by the United States Court of Appeals for the District of Columbia circuit. There, it was observed:

> The Independent Counsel claims that we misapplied *United States v. Rinaldi*, 808 F.2d 1579 (D.C. Cir. 1987), in remanding "for a massive inquiry into 'the *taint* of the testimony and the *derivation* of the testimony.' " . . . IC's argument rests on the *ipse dixit* that "the prosecution's freedom from taint establishes that its evidence was necessarily derived independently" and therefore that inquiry mandated by *Rinaldi* would be "superfluous."
>
> . . . This bold proposition, however, would convert *Kastigar*'s total prohibition on use, *Kastigar v. United States*, 406 U.S. 441, 453, 92 S.Ct. 1653, 1661 32 L.Ed.2d 212 (1973), to a mere ban on significant prosecutorial exposure to the immunized

> testimony. *It simply does not follow that insulating prosecutors from exposure automatically proves that immunized testimony was not used against the defendant. Kastigar is instead violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony. United States v. North*, 920 F.2d 940, 941-42 (D.C. Cir. 1990) (*en banc)* (Emphasis added.)

The court went on to say:

> Indeed, *Rinaldi* explicitly recognized that witnesses' exposure to immunized testimony can taint their trial testimony *irrespective of the prosecution's role in the exposure* and that an inquiry is therefore necessary into whether the content of witnesses' testimony was derived from or motivated by the immunized testimony. 920 F.2d at 942. (Emphasis added.)

Although the *North* court was speaking of in-court declarants, the same principles should apply here for the out-of-court declarants presented by the government, i.e. Petitioner's co-conspirators' out-of-court declarations used as co-conspirator declarations. Federal Rule of Evidence 806 makes the two types of declarants substantially identical:

> When a hearsay statement, or a statement defined in Rule 801(d)(2),(C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness.

> Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination. Fed.R.Evi. 806

It has been noted:

> Rule 806 allows the credibility of a hearsay declarant to be impeached as if the declarant had taken the stand to testify. Thus, for impeachment purposes, the physical location of the testifying declarant is legally insignificant. Impeachment may be made through the use of prior inconsistent statements under Rule 613, reputation testimony under Rule 608, or through prior convictions under Rule 609. Commentary, Rule 806.

The words of the *North* court apply here:

> *Kastigar is . . . violated whenever the prosecution puts on a witness whose testimony is shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony.* *United States v. North*, 920 F.2d 940, 941-42 (D.C. Cir. 1990) (*en banc*) (Emphasis added.)

The government argued from *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983), the proposition that Stanfa's disclosures of the content of his immunized testimony outside the grand jury

would not trigger the derivative use issues of *Kastigar* because it constituted a type of waiver or volunteered statement, regardless of whether it was motivated by Stanfa's own immunized testimony or the techniques of the prosecutors to encourage such disclosure.

We contend that *Pillsbury* does not defeat the present argument. There, an immunized anti-trust witness pled the Fifth Amendment in a subsequent civil case. He was held in contempt by the lower court which viewed him as no longer having a privilege. This Court ruled that he still had a privilege holding that civil deposition testimony would not be "immunized" testimony. The Court expressly declined to rule on the point that is now pertinent:

> [Justice Blackmum] discusses the "fruits" doctrine [in his concurring opinion] where a witness' testimony at a deposition is an "independent act of free will" and concludes that "had Conboy answered the deposition questions, his testimony would not have been protected by the original immunity grant . . ." We have no occasion to address this hypothetical. The issue is whether [the witness] can be compelled to testify. [Majority Opinion at 258, fn. 13]

Pillsbury leaves the instant issue open although the Marshall, Brennan and Stevens opinions appear to support Stanfa's viewpoint that subsequent disclosures about immunized testimony can themselves be derivative product or "fruits" if law enforcement attempts to use them as evidence. No subsequent case has been found that addresses the point left open in *Pillsbury*. Certiorari should be granted to consider this important point.[5]

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5. The court of appeals did not reach this point because it found the district court concluded that the *Kastigar* burden had been met even as to self-publication (10a). Petitioner takes issue that the district made any such finding.

CONCLUSION

For the reasons stated above, it is respectfully submitted that this Court should grant the Writ of Certiorari herein sought.

Respectfully submitted,

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APPENDIX

APPENDIX A — DENIAL OF PETITION FOR PANEL REHEARING DATED SEPTEMBER 29, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1613

UNITED STATES OF AMERICA

v.

JOHN STANFA
Appellant

SUR PETITION FOR PANEL REHEARING

BEFORE: STAPLETON, RENDELL, and COWEN, *Circuit Judges*

The petition for panel rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for panel rehearing, the petition for panel rehearing is denied.

By the Court,

s/ Walter K. Stapleton
Circuit Judge

Dated: SEP 29 1998

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED JULY 28, 1998

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1613

UNITED STATES OF AMERICA

v.

JOHN STANFA
Appellant

Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. No. 94-cr-00127-1)
District Judge: Honorable Ronald L. Buckwalter

Argued June 12, 1998

BEFORE: STAPLETON, COWEN and RENDELL,
Circuit Judges

(Opinion filed JUL 28 1998)

MEMORANDUM OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

John Stanfa appeals from his conviction of ten violations of federal criminal law, the result of a concerted federal and state investigation into the activities of the Philadelphia branch

of a national crime organization known as "La Cosa Nostra," or the mafia. After a two-month jury trial, Stanfa was convicted of conspiring to participate, and participating, in the affairs of an enterprise through a pattern of rackcteering activity, in violation of 18 U.S.C. § 1962 (d) and (c). In addition, Stanfa was found guilty of five counts of violent crime committed as part of the racketeering scheme, in violation of 18 U.S.C. § 1959(a)(1); one count of conspiracy to obstruct justice, in violation of 18 U.S. § 371; one count of extortion, in violation of the Hobbs Act, 18 U.S.C. § 1951; and one count of illegal bookmaking, in violation of 18 U.S.C. § 1955. This appeal followed. We will affirm.

I.

In the early 1990s, an investigation was commenced into the activities of the Philadelphia branch of the mafia. The task force that initiated the investigation was comprised of federal, Pennsylvania, and Philadelphia authorities, who pooled resources with the ultimate objective of bringing a federal prosecution, The task force engaged in a lengthy and wide-ranging inquiry that accumulated evidence over a period of several years. During the early stages of the task force's work, New Jersey state law enforcement officials, who elected not to participate in the joint effort, conducted a parallel, and by all accounts competing, investigation. The task force and New Jersey's investigations proceeded at a similar pace for several years, though it appears that the competition between the groups of investigators prevented the sharing of information between them.

In late 1993, the New Jersey authorities, over the task force's strong objections, compelled John Stanfa to testify before a state grand jury pursuant to a grant of immunity. Stanfa

provided testimony on four occasions during October and November 1993. Recognizing the possibility that the immunized testimony might taint the case being built against Stanfa, the New Jersey authorities established a system for limiting exposure to the testimony. Only one transcript of the testimony was created, and it was securely kept in the state grand jury clerk's office. This copy could only be viewed with the written permission of one individual; in practice, only four New Jersey investigators (the so-called "taint team") ever viewed the testimony. The investigators on the taint team were forbidden from discussing the testimony with investigators not exposed to the testimony.

At some point after Stanfa testified before the grand jury, New Jersey officials began sharing information with the task force. In order to protect against taint from the immunized testimony, the federal officials also adopted procedures designed to prevent exposure to the testimony. The officials working on the case were instructed to avoid exposure to the testimony and to establish independently the source of all evidence gathered.

Despite these protections, it appears that some of the members of the New Jersey taint team, who had access to the immunized testimony, engaged in conversations with members of the federal task force. In particular, Joel Friedman, the head of the task force, engaged in discussions with taint team member Michael Bozza, the head of the New Jersey investigation. Robert Courtney, Friedman's assistant, had discussions with Harry Grove, also a taint team member. However, these individuals also testified that the content of the immunized testimony was never communicated to the federal officials.

Appendix B

Prior to trial, Stanfa requested a hearing to determine the extent to which the government's evidence had been derived from the immunized testimony, and seeking suppression of any tainted evidence, pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), and its progeny. The district court denied this motion, deferring a hearing on taint until after trial. After Stanfa had been convicted by the jury, he renewed his motion for suppression; a six-day hearing was then held in June 1996. The district court denied the motion for suppression on July 9, 1996.

II.

The Fifth Amendment grants a privilege against compelled self-incrimination. This privilege is an exception to the general rule that the government has the power to compel testimony before a court, grand jury, or agency. The privilege "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 445 (1972). However, the privilege is not absolute, and testimony that is potentially incriminatory may be elicited by the grant of immunity from prosecution. In *Kastigar*, the Supreme Court determined that in order to compel testimony over an assertion of the privilege, the Fifth Amendment requires a grant of use and derivative use immunity. In other words, to compel testimony, the state must assure that the testimony itself, or any evidence derived from the testimony, will not be used in a subsequent criminal prosecution. *See* 406 U.S. at 459.

If, as in this case, the government seeks criminal prosecution of a person who has provided immunized testimony, *Kastigar* protection requires the district court to satisfy itself that the use and derivative use immunity has been maintained. In such a circumstance, *Kastigar* requires that the government

meet a "heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." 406 U.S. at 461-62.

Stanfa's testimony before the New Jersey grand jury was secured with a grant of use and derivative use immunity, as required by *Kastigar*. Stanfa and the government agree that Stanfa's grand jury testimony was not used against him in the federal prosecution, and that none of the evidence used in the federal prosecution was derived from his grand jury testimony. However, Stanfa contends that New Jersey investigators indirectly used his grand jury testimony to shape their investigation. This "non-evidentiary" use of the testimony may have included "assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea bargain, interpreting evidence, [and] planning the presentation of evidence [at trial.]" Stanfa's Br. at 19; *see United States v. Semkiw*, 712 F.2d 891, 895 (3d Cir. 1983). When the fruits of the New Jersey investigation were turned over to federal prosecutors, Stanfa claims, the benefit of the non-evidentiary use of his immunized testimony by state investigators was transferred to the federal prosecutors, tainting their subsequent investigation. Thus, Stanfa contends that the federal government failed to meet its *Kastigar* burden because it failed to prove "that the focus of the New Jersey investigation itself was not affected by the information gathered" from his immunized testimony. Stanfa's Br. at 26.

The district court rejected this line of reasoning. At the conclusion of the post-trial *Kastigar* hearing, the district court produced an opinion memorializing the findings of fact supporting its decision to deny Stanfa's motion.[1] The district

1. We review these findings of fact for clear error. *See United States v. Provenzano*, 620 F.2d 985, 1005 (3d Cir. 1980).

court first heard the testimony of Michael Bozza, the New Jersey official in charge of the state investigation, Bozza testified, and the district court specifically found, that:

> [Bozza] never used the immunized grand jury testimony of Stanfa to either directly or indirectly initiate an investigation of Stanfa, focus on all investigation of Stanfa, develop leads, obtain the cooperation of witnesses, secure any type of search warrant or Title III, prepare for trial for use in questioning any witness at trial, obtain any evidence against Stanfa, and disclose the contents to any witness who testified before the grand jury or at trial.

App. at 1600. In addition, Bozza testified and the district court specifically found that when information was shared between the New Jersey and federal officials, Bozza "did not reveal either directly or indirectly anything of the contents of Stanfa's immunized testimony before the grand jury, or make any investigative or strategic suggestions to the prosecution team." App. at 1601.

The district court also credited similar testimony from Harry Grove, John Matthews, and Donald Simonini, the only other New Jersey officials with access to Stanfa's immunized testimony, They testified, and the district court specifically found, that Stanfa's testimony was not shared with federal officials and that it was not used directly or indirectly to "focus an investigation of Stanfa" "develop leads," or for any other purpose. App. at 1603-04, 1611. The district court also credited testimony by the federal officials responsible for the investigation of Stanfa, finding that those officials neither received nor directly or indirectly used the immunized testimony to alter the course or nature of their investigation or

the subsequent prosecution. *See, e.g.*, App. at 1606-07 (Robert Courtney); 1609 (Barry Gross); 1612-13 (Katherine Carter); 1615 (Charlotte Lang); 1615-16 (Joel Friedman); 1617-18 (James Maher).

The evidence presented at the post-trial *Kastigar* hearing overwhelmingly indicates that neither the federal or state investigations of Stanfa were influenced by the content of his immunized testimony. The district court concluded that this testimony was credible and specifically made findings of fact based upon it. On appeal, Stanfa has proffered no reason for finding these facts to be clearly erroneous. Stanfa faults the government for failing to prove that New Jersey investigators were not influenced by Stanfa's immunized testimony by "shift[ing] the focus of their investigative methodology by providing work product to the federal authorities." Stanfa's Br. at 32. At best, then, Stanfa seeks to hold the government to its "heavy burden" under *Kastigar* to show that the tainted testimony did not influence his conviction. However, the evidence outlined above, which is unrefuted, specifically addresses the issue of the immunized testimony's possible indirect influence on the investigation, and the district court explicitly found that it had no such effect. In these circumstances, we find no error in the district court's careful consideration of the suppression motion, and will therefore affirm the district court.

III.

Stanfa makes two additional arguments on appeal. First, Stanfa argues that the district court erred in holding his suppression hearing post-trial. He claims that the failure to hold the hearing before trial prejudiced him by (1) forcing him to attend the trial; (2) subjecting him to the harmless error rule,

which would not have applied pretrial; (3) forcing him to choose a trial strategy without knowing the result of the suppression hearing; and (4) affecting his ability to plea bargain. *See* Stanfa's Br. at 3334. It is clear that a district court, in the exercise of its discretion, may hold a *Kastigar* hearing post-trial. *See, e.g., United States v. Frumento*, 552 F.2d 534, 542 n. 14 (3d Cir. 1977) (en banc). We will therefore affirm the district court on this claim.

Second, Stanfa claims that his suppression motion should have been granted on the basis of his attorney's and his own dissemination of the contents of his immunized testimony. In particular, Stanfa argues that the content of his immunized testimony may have influenced the cooperating co-conspirators that testified against him at trial. *See* Stanfa's Br. at 28-31. However, the district court specifically found that there was "no credible evidence from the Kastigar hearing that anything defendant testified to before the grand jury was communicated to anyone (other than the taint team members), including Stanfa's lawyers." App. at 1622. In addition, the district court credited post-trial interviews with the cooperating witnesses that indicated their testimony was "independent of Stanfa's immunized testimony." App. at 1629. Stanfa has not provided

any reason to believe this finding is clearly erroneous.[2] Thus, we will affirm the district court.[3]

TO THE CLERK

Please file the foregoing Memorandum Opinion.

s/ Walter K. Stapleton
Circuit Judge

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2. There is a serious question whether a defendant's self-publication of the content of immunized testimony is even eligible for *Kastigar* protection, or rather whether such disclosures are "voluntary out-of-court statements that are not protected at all." Appellee's Br. at, 75. *See Pillsbury v. Conboy*, 459 U.S. 248, 256 (1983) ("Even when a deponent's deposition answers are identical to those he gave to the grand jury [under immunity] . . . [e]ach new statement of the deponent creates a new 'source' "). However, we need not reach this issue because the district court concluded that the government met its *Kastigar* burden even as to any self-publication of Stanfa's grand jury testimony, and Stanfa provides no reason to believe this conclusion to be clearly erroneous.

3. Stanfa joins the appellate arguments of his co-defendants, pursuant to Fed. R. App. P. 28(i). *See* Appeal Nos. 95-2053, 96-1614, 96-1615, 96-1616, 96-1663, and 96-2064. Since we have rejected the arguments made in these appeals, we will affirm on this basis as well.

APPENDIX C — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 28, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-1613

UNITED STATES OF AMERICA

v.

JOHN STANFA
Appellant

Appeal from the United States District Court
For the Eastern District of Pennsylvania
(D.C. Crim. No. 94-cr-00127-1)
District Judge: Honorable Ronald L. Buckwalter

Argued June 12, 1998

BEFORE: STAPLETON, COWEN and RENDELL,
Circuit Judges

JUDGMENT

This case came on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was argued on June 12, 1998,

On consideration whereof, it is

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ORDERED AND ADJUDGED by this Court that the judgment of the district court entered July 11, 1996, be and the same is hereby affirmed.

ATTEST:

s/ [illegible]
Acting Clerk

DATED: JUL 28 1998

Certified as a true copy and issued in lieu
of a formal mandate on October 7, 1998

Teste: s/ P. Douglas Sisk

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX D — CONFIRMATION OF EXTENSION OF TIME TO FILE PETITION DATED NOVEMBER 17, 1998

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

Mr. Thomas Carroll
150 South Independence Mall
6th and Chestnut
Philadelphia, PA 19106

Re: John Stanfa
v. United States
Application No. A-413

Dear Mr. Carroll:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on November 17, 1998, extended the time to and including February 26, 1999.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

s/ Sandra Elliott Spagnolo
Sandra Elliott Spagnolo
Assistant Clerk

Appendix D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. Thomas Carroll
150 South Independence Mall
6th and Chestnut
Philadelphia, PA 19106

Hon. Seth P. Waxman
Solicitor General
Department of Justice
Washington, DC 20530

Clerk
United States Court of Appeals for
the Third Circuit
601 Market Street, Room 21400
Philadelphia, PA 19106

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JULY 9, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 94-127-1

UNITED STATES OF AMERICA

v.

JOHN STANFA

ORDER

AND NOW, this 9th day of July, 1996, after a hearing having been held, and after consideration of the respective legal briefs filed by the defendant and the government, it is hereby ORDERED that the *Kastigar* motion (Docket No. 590) filed on March 29, 1995, and the relief anticipated by it, is DENIED. The court's memorandum will be filed in due course.

BY THE COURT:

s/ Ronald L. Buckwalter
RONALD L. BUCKWALTER, J.

APPENDIX F — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JULY 17, 1996 AND FILED JULY 18, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

JOHN STANFA

BUCKWALTER, J. July 17, 1996

MEMORANDUM

This memorandum is written to explain my reasons for denying the defendant John Stanfa's motion for relief by my order dated July 9, 1996.

The following narrative in Parts I, 11 and III constitutes my findings of fact based upon matters of record from the trial of Stanfa and the hearings held on June 3, 4, 5, 6, 7 and 14 of 1996, together with exhibits admitted at that hearing.

Stanfa was indicted on Federal RICO charges on March 17, 1994. Among other pretrial motions, he filed one on March 29, 1995 seeking a *Kastigar* hearing (Docket No. 590), which I denied by an order dated June 30, 1995. By a previous order dated March 10, 1995 (Docket No. 569), I had scheduled Stanfa's trial for September 18, 1995, together with seven (7) other defendants.

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On August 22, 1995, Stanfa filed a motion to reconsider my order of June 30, 1995. This motion was also denied, but it included the directive that "a *Kastigar* hearing, if necessary, will be held upon motion by defendant, after the trial."

The trial of Stanfa which began on September 18, 1995 resulted in guilty verdicts on both Federal RICO charges, plus additional counts as reflected in the jury verdict of November 21, 1995. Subsequent to Stanfa's trial, it was agreed that the *Kastigar* hearing would be held beginning June 3, 1996.

I. REVIEW OF WITNESSES AT *KASTIGAR* HEARING.

The first witness called by the government was Michael Bozza, presently Deputy Director-In-Charge of Investigations for the New Jersey Division of Criminal Justice. I found Mr. Bozza to be a credible witness and the following facts are based on his testimony.

During September and October of 1993, Fred DeVesa was the Acting Attorney General of the State of New Jersey. Mr. Bozza was at that time the First Assistant Attorney General and also in charge of investigations in the Division of Criminal Justice, of which the Organized Crime Bureau was a subordinate part. The Chief of the Organized Crime Bureau was John Matthews. Typically, attorneys from the Organized Crime Bureau of the Division of Criminal Justice would be assigned to work with detectives in the state police. Both the Division of Criminal Justice and the New Jersey State Police were involved in the investigation of the Philadelphia LCN Family in the summer of 1993. This investigation included state court authorized electronic surveillance using a "car bug", as well as a bug in Stanfa's home.

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In light of the high visibility of mob activity in the summer of 1993, consideration was given to subpoenaing Stanfa and other Philadelphia LCN members to appear before a state grand jury. To that end, a list was prepared by the state police and Stanfa was the first person subpoenaed to appear before the state grand jury in Trenton, New Jersey on September 30, 1993. Stanfa refused to testify, so it was decided to compel his testimony. Being aware that federal authorities were also conducting an investigation of the Philadelphia LCN, Mr. Bozza informed Deputy United States Attorney Joel Friedman that they were contemplating "immunizing" Stanfa. According to Mr. Bozza, both Friedman and the U.S. Attorney reacted very negatively and requested that New Jersey not compel the testimony of Stanfa or anyone else related to the organized crime family.

On October 1, 1993, the U.S. Attorney, Mr. Rotko, wrote to Attorney General DeVesa and strongly opposed the grant of immunity to a list of some 20 people, including Stanfa. Nevertheless, New Jersey authorities remained determined to immunize Stanfa and so advised the U.S. Attorney by letter dated October 6, 1993 from Mr. Bozza. In the letter, Bozza stated that, "If Stanfa's testimony is compelled, we will take all appropriate and necessary precautions to assure that your investigation and any prosecutions that emanate from that investigation are not legally affected by Stanfa's compelled testimony." At the time of the letter., the state and federal authorities were not cooperating in their respective investigations. The origin of the "frayed" relationship was sometime in the summer of 1993.

Despite the concerns of the U.S. Attorney, an order was sought and obtained from Judge Lenox of the Superior Court

of New Jersey, compelling Stanfa to appear and testify. The U.S. Attorney was informed of this by note dated October 8, 1993. Mr. Rotko responded that same day to Mr. DeVesa, again stating his strenuous objections and also requesting that New Jersey "create a system of accountability regarding the use of any information provided by Stanfa to ensure that your actions today not taint other cases, state or federal."

In response to this latter request, an internal memo was sent to John Mulvahill, Director of the Criminal Justice Division, John Matthews, Larry Monaco, Ted Grove, members of the state police, and the grand jury clerk. Copies were sent to the superintendent of the state police, Justin Dintino, the Attorney General and Robert Bucchino, the immediate supervisor of criminal investigator Donald Simonini in the Organized Crime Bureau. This memo, Government Exhibit 6, set forth a 10-step procedure to ensure that any investigations and prosecutions of Stanfa were not "impacted" should he provide answers. In Mr. Bozza's opinion, these steps were in fact done.

On October 18, 1993, a letter was sent from Attorney General DeVesa to Mr. Rotko expressing his awareness of the concerns regarding the state's compulsion of John Stanfa. DeVesa went on to state in the letter that, "The Stanfa compulsion aspect of the State of New Jersey has been assigned to and is limited to four members of the Division of Criminal Justice. No member of the New Jersey State Police nor any member of the Division of Criminal Justice beyond the four assigned will ever be privy to John Stanfa's answers or any information or evidence derived from those answers."

As it turned out, Stanfa testified on four occasions before the state grand jury of New Jersey under the grant of immunity.

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Those occasions were October 8, October 22, October 29 and November 5 of 1993. In New Jersey, the grand jury practice is to permit only grand jurors, the witness, the prosecuting attorney, the grand jury clerk, a court reporter, and when required, an interpreter to be present. In this particular case, the stenographer or court reporter took down shorthand notes which were then typed by the stenographer and provided to the grand jury clerk or the attorney who was handling the particular proceeding. In the Stanfa case, however, one original with no copies was provided to the grand jury clerk and sealed. The control system employed was that the clerk would maintain the original, which was the only transcript of the testimony, under seal. In order to get access to the transcript, the clerk would require written authorization from Mr. Bozza and she would then release that transcript solely to the person who was authorized. That person then had to keep track of where and for what length of time he had used the transcript. After that person was through with the transcript, he would return it to the clerk, who then continued to maintain it under seal. The only portion of Stanfa's immunized grand jury testimony ever made part of any court documents was when an excerpt was photocopied and attached to an application to show cause why Stanfa should not be held in contempt before the state grand jury Judge in Trenton.

This pleading was a sealed document. The hearing with regard to it was not open to the public, and it was described by Mr. Bozza as being sealed. No copies of the Stanfa testimony before the grand jury were provided to the United States Attorney's Office in the Eastern District of Pennsylvania. To Mr. Bozza's knowledge, beyond himself, only Ted Grove, John Matthews and Don Simonini ever had access to the immunized grand jury testimony of Stanfa. Bozza never discussed the

contents of Stanfa's immunized grand jury testimony with anyone other than Grove, Matthews and Simonini. Bozza testified that he never used the immunized grand jury testimony of Stanfa to either directly or indirectly initiate an investigation of Stanfa, focus on an investigation of Stanfa, develop leads, obtain the cooperation of witnesses, secure any type of search warrant or Title III, prepare for trial for use in questioning any witnesses at trial, obtain any evidence against Stanfa, and disclose the contents to any witness who testified before the grand jury or at trial.

Mr. Bozza offered the opinion that it was his belief that none of the evidence presented by the federal government to the grand jury that returned the indictment in *United States v. Stanfa*, or presented to the jury in the Stanfa RICO trial derived in any way from Stanfa's New Jersey state immunized grand jury testimony, and that he could not see how it could have been.

Mr. Bozza also testified that between the period of October 8, 1993, which was the first day Stanfa testified under a grant of immunity, and November 22, 1995, when the Stanfa RICO jury returned its guilty verdicts, he had five occasions to communicate with Joel Friedman. During the discussion of those five matters, Mr. Bozza did not reveal either directly or indirectly of the contents of Stanfa's immunized testimony before the grand jury, or make any investigative or strategic suggestions to the prosecution team. (The prosecution team consisted of Joel Friedman, Barry Gross, Robert Courtney, and Paul Mansfield.)

The second witness called by the government was Harry Theodore Grove, a Deputy Attorney General for the State of

New Jersey, Division of Criminal Justice. I found Mr. Grove to be a credible witness and the following facts are based on his testimony.

During the late summer and early fall of 1993, Mr. Grove was with the Organized Crime and Racketeering Bureau and his immediate supervisor was John Matthews. His role in the Stanfa investigation was to assist the state police in any legal matters that arose. He was present at the first grand jury hearing after John Stanfa had been required to testify under immunity. In fact, Mr. Grove was the one who conducted the questioning of John Stanfa.

It is his opinion that the procedures set forth in Government Exhibit 6 regarding the methods to be used in encapsulating the testimony of John Stanfa were done. The state investigator, Donald Simonini, assigned to assist Grove in the grand jury had essentially two duties. In the words of Grove (N/T June 13, 1996, p. 152), "One would be if the testimony of John Stanfa revealed any immediate need to obtain evidence, such as the location of a body or something like that, which needed immediate attention, or in the event that there was any perjury charges that arose out of the testimony, he would follow up on those."

As things turned out, Investigator Simonini never conducted either type of investigation. Mr. Grove testified as to occasions when he obtained the transcripts of the Stanfa testimony in accordance with the procedures described by Mr. Bozza. If he took the documents overnight, he would either secure them in his office in a locked filing cabinet inside a locked closet, or when he was traveling between state grand jury and his home, he would keep them secured in the locked

trunk of his car inside his garage. With regard to notes he took during his examination of John Stanfa, he used the same procedure of locking them in his filing cabinet inside the locked closet in his office.

Besides Mr. Grove himself, only Mike Bozza, John Matthews and Don Simonini had access to the immunized grand jury testimony which was kept in locked conditions by the grand jury clerk. There was one exception to this; and that was when Mr. Grove was directed to seek an order to show cause why Stanfa should not be held in contempt of court. This occurred after Stanfa's November 5, 1993 testimony and pleadings were prepared by Grove and subsequently presented to Judge Lenox. This presentation included 13 pages of photocopied immunized testimony, but the proceedings in court were closed.

Mr. Grove never discussed the contents of Stanfa's immunized grand jury testimony with anyone other than Bozza., Matthews and Simonini, nor did he disclose the contents of the immunized testimony of Stanfa to anyone other than those three and to the limited extent that he argued the previously referred to motion before Judge Lenox. Mr. Grove did not use Stanfa's New Jersey immunized grand jury testimony either directly or indirectly to do any of the following: (1) to initiate an investigation of Stanfa; (2) to focus an investigation of Stanfa; (3) to develop leads; (4) to obtain cooperation of witnesses; (5) to secure any type of search warrant or a Title III; (6) to prepare for trial; (7) to use in questioning any witness at trial; (8) to obtain any evidence against Stanfa; and (9) to disclose the contents to any witness who testified before the grand jury or at trial in this case.

Between October 8, 1993 and November 22, 1995, Grove had some communications with Assistant U.S. Attorney Robert

Courtney. During any communications he may have had with members of the United States Attorney's prosecution team, he did not reveal either directly or indirectly anything of the contents of Stanfa's immunized grand jury testimony, or make any investigative or strategic suggestions to the prosecution team.

The third witness called by the government was John A. Matthews, Deputy Attorney General of the State of New Jersey. I found Mr. Matthews to be a credible witness and the following facts are based on his testimony.

During the late summer or early fall of 1993, Mr. Matthews was in charge of the Organized Crime Bureau of the Division of Criminal Justice of the State of New Jersey. He was the supervisor of that bureau and reviewed all of Grove's work. Mr. Matthews followed the procedures set forth in Exhibit 6 for encapsulating the testimony of Stanfa, and to his knowledge, others did so as well. He was present during the compelled testimony of Stanfa and discussed that testimony with Grove and Bozza. He never, however, discussed Stanfa's immunized grand jury testimony with anyone else other than the three encapsulated persons; namely, Grove, Bozza and Simonini. Moreover, he never disclosed the contents of the immunized testimony to anyone at all in any other law enforcement. He testified that he did not use Stanfa's immunized grand jury testimony either directly or indirectly to: (1) initiate an investigation of Stanfa; (2) focus an investigation of Stanfa; (3) develop leads; (4) obtain cooperation of witnesses; (5) secure any type of search warrant or a Title III; (6) prepare for trial; (7) use in questioning any witness at trial; (8) obtain any evidence against Stanfa; and (9) disclose the contents to any witness who testified before the grand jury or at trial in this case.

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The fourth witness called by the government was Robert Edward Courtney, III, Assistant United States Attorney for the Eastern District of Pennsylvania. I found Mr. Courtney to be a credible witness and the following facts are based on his testimony.

Mr. Courtney testified that the investigation of Stanfa began sometime in 1990, and that he began to work on the case sometime around February or March of 1993. He became aware of the State of New Jersey's contemplation of granting immunity to Stanfa in late September or early October during conversations with Joel Friedman. The office of the United States Attorney was strongly opposed to the grant of immunity.

The Government's Exhibit 37 reflects the memorandum of Mr. Courtney regarding what was done with respect to the immunization of Stanfa. In part, the memorandum provides as follows:

> On October 12, 1993, a meeting was held at the FBI's Philadelphia Office to discuss this issue. Present were for the FBI, Bob Rueter, SAC, standing for special agent in charge, Frank Gallagher, assistant special agent in charge, Dodge Frederick, assistant special agent in charge, John Thomas, legal counsel, Charlotte Lang, supervisory special agent, and Paul Hayes, special agent. For the U.S. Attorney's Office, Barry Gross, Robert E. Courtney, III. Joel Friedman was unable to attend because he was trying a case. However, he had discussed the subject in detail with Gross and Courtney in advance of the meeting.

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At this meeting, the following was agreed:

(a) All informants providing information regarding Stanfa would be warned not to inquire about Stanfa's New Jersey grand jury testimony, not to pass along any information inadvertently acquired about the same.

(b) All FBI agents and Philadelphia police officers working in the federal investigation would be cautioned to establish the source of any information before accepting it from the New Jersey State Police. Reports will note the source of the information in order to institutionally document its existence and acquisition of compelled testimony.

(c) In connection with (a) and (b) above, it was agreed that if any agent or officer felt there was any question — there may be a question about a particular piece of information — the agent or officer would contact FBI counsel John Thomas before disseminating any information to others working on the investigation. If this situation arises, Mr. Thomas will review the facts and circumstances to determine if there is a taint problem.

(d) In the event that an agent or officer is determined to be tainted, that person would be removed from the federal investigation.

(e) It was further discussed that Arnold Gordon, First Deputy Assistant District Attorney in the Philadelphia District Attorney's Office would be informed of the problem and requested to insure that the police department also guard against taint. It is also decided that the Philadelphia FBI office would contact all the FBI offices in New York and Newark to explain the potential taint problem and

to request that they insulate their investigations from compelled testimony.

According to Mr. Courtney, those procedures were followed. Mr. Courtney never read the immunized grand jury testimony of Stanfa, never saw it, learned of its content, had access to it or discussed it with anyone. Moreover, no one ever disclosed any of that testimony to him. Courtney did not use the Stanfa immunized grand jury testimony to either directly or indirectly (1) initiate an investigation of Stanfa; (2) focus an investigation of Stanfa; (3) develop leads; (4) obtain cooperation of witnesses; (5) secure any type of search warrant or a Title III; (6) prepare for trial; (7) use in questioning any witness at trial; (8) obtain any evidence against Stanfa; and (9) disclose the contents to any witness who testified before the grand jury or at trial in this case. Moreover, he never disclosed the content of Stanfa's immunized testimony in any way at all to any of the trial witnesses.

Mr. Courtney also testified as to his contact with Mr. Grove. The first contact after Stanfa's immunized testimony occurred in early January, approximately January 5, 1995. Mr. Courtney recalled saying to Mr. Grove at the very beginning of the conversation that he wanted it clear that there would not be any discussion of the immunized grand jury appearance that Stanfa made, and further stated that Mr. Grove indicated that he understood the problem and that both agreed at the outset there would be no reference to that event. In all subsequent conversations or, communications he had with Mr. Grove, Mr. Grove never at any time disclosed in any way the contents of Stanfa's immunized testimony. Moreover, he never made any suggestions to Mr. Courtney on how to conduct the investigation or prosecution of Mr. Stanfa.

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In addition, Mr. Courtney testified as to Exhibit 39, which was the report of an interview of John Veasey, who testified against Stanfa at the trial. According to that exhibit, Veasey stated that he did not know Stanfa was given immunity and compelled to testify, and that Stanfa never talked to Veasey about the grand jury. Veasey further stated that his decision to cooperate with law enforcement was not in any way influenced by John Stanfa's immunized grand jury testimony. Veasey said he never knew Stanfa gave any testimony, never knew about a transcript of the testimony, and never learned the content of Stanfa's immunized testimony or had access to it.

The fifth witness called by the government was Barry Gross, Assistant United States Attorney for the Eastern District of Pennsylvania. I found Mr. Gross to be a credible witness and the following facts are based upon his testimony.

Mr. Gross was involved in the very beginning of the Stanfa investigation, his involvement beginning in October of 1990. Mr. Gross attended the meeting which was the subject of Government Exhibit 37. The procedures laid out to prevent exposure to Stanfa's immunized testimony were carried out. Mr. Gross' personal steps to prevent exposure of any witness to Stanfa's immunized testimony included steps he took when he first interviewed government witness Rosario Conti Bellocchi on April 29, 1995. This meeting occurred six months before the trial, and the first thing he said to Bellocchi was that he did not want to know anything about defense strategy because he was aware that Bellocchi had been jailed with the other defendants for over a year, and that he didn't want to know anything about Stanfa's immunized testimony and that the government didn't even want to know if Stanfa testified, and if he did, what the content of that testimony was. With regard to

the cooperating witness, James Lynch, Gross also told Bill Perna, the detective involved with Lynch, that he didn't know if he had any contact with the immunized testimony, but he didn't want to know anything about it. It was also the first thing that Gross said to James Lynch; namely, that "I don't know if you have had any contact, and I don't want to know anything about it."

Mr. Gross never read any of Stanfa's immunized testimony and never saw a transcript of it, never learned of the content of it and never had access to it. He never discussed the content with anyone and no one ever disclosed the content of Stanfa's immunized testimony with him.

Mr. Gross never used Stanfa's New Jersey immunized grand jury testimony either directly or indirectly to (1) initiate an investigation of Stanfa; (2) focus an investigation of Stanfa; (3) develop leads; (4) obtain cooperation of witnesses; (5) secure any type of search warrant or a Title III; (6) prepare for trial; (7) use in questioning any witness at trial; (8) obtain any evidence against Stanfa; and (9) disclose the contents to any witness who testified before the grand jury or at trial in this case. In addition, Mr. Gross, from the time period of on or about October 7, 1993 when the immunity order was obtained, to November 22, 1995 when the jury verdict was returned, received no suggestions about strategy or how to conduct the investigation and trial of Stanfa from any New Jersey authorities. Mr. Gross testified that none of the federal government's evidence as presented to the grand jury to obtain this indictment derived in any way from Stanfa's immunized grand jury testimony and that none of the evidence that was presented at the trial of Stanfa, which lead to his conviction, derived in any way from Stanfa's immunized New Jersey state testimony.

Gross stated that he knew prior to October 7, 1993 about the association of Stanfa with Angelo Bruno and Joseph Merlino because he was conducting the day-to-day supervision of the electronic surveillance in Salvatore Avena's office. He heard the recorded conversations, including Stanfa's voice on numerous tapes, concerning how he wanted to kill Joseph Merlino. Prior to October 7, 1993, he was aware, based on Title III electronic surveillances and interviews with Biagio Adornetto, who he put before the grand jury in June of 1993, that Joseph Merlino had been a rival of John Stanfa's La Cosa Nostra, that Stanfa then brought Merlino into the fold for a period of time, and that later, Merlino had become a rival again. Thereafter, John Stanfa had been talking about the various ways that he was going to kill Joseph Merlino.

Adornetto, who testified before a federal grand jury on June 8, 1993, signed a cooperation agreement with the government the day before that.

The sixth witness called by the government was Donald J. Simonini, presently an Administrator of Investigations with the Criminal Division of the New Jersey Attorney General's Office. I found Mr. Simonini to be a credible witness and the following facts are based upon his testimony.

Prior to his current position, Simonini was a state investigator in the Organized Crime and Racketeering Bureau of the Division of Criminal Justice. In October of 1993, he was assigned to assist Deputy Attorney General Ted Grove in any investigation arising out of the compelled immunized grand jury testimony of John Stanfa. As the investigator, he provided no one with any information with respect to the subject matter, nature, and content of Stanfa's answers to the grand jury. He

was never personally present in the grand jury when Stanfa testified and did not read any of Stanfa's grand jury transcripts. He had some discussions with Deputy Attorney General Grove but never discussed Stanfa's grand jury testimony with anyone else. He took no investigative steps because he was not assigned to carry out any investigation.

Between October 8, 1993 and November 22, 1995, he did not have any communications with federal prosecutors or agents involved in the prosecution of the Stanfa RICO case. Insofar as Simonini was aware, none of the federal government's evidence presented to the grand jury or presented to the jury in the Stanfa RICO trial derived in any way from Stanfa's New Jersey state immunized grand jury testimony. He personally did not use the testimony either directly or indirectly to (1) initiate an investigation of Stanfa; (2) focus an investigation of Stanfa; (3) develop leads; (4) obtain cooperation of witnesses; (5) secure any type of search warrant or a Title III; (6) prepare for trial; (7) use in questioning any witness at trial; (8) obtain any evidence against Stanfa; and (9) disclose the contents to any witness who testified before the grand jury or at trial in this case.

The seventh witness called by the government was Katherine M. Carter, nee Anderson, Special Agent for the Federal Bureau of Investigation. I found Ms. Carter to be a credible witness and the following facts are based on her testimony.

Ms. Carter received her assignment to work on the federal RICO investigation of John Stanfa and the Philadelphia La Cosa Nostra family in November of 1992. She was initially assigned to assist in Title III monitoring. She heard about John Stanfa's

immunization on the day it happened, October 8, 1993, and received instructions from her supervisor, Charlotte Lang. At that time, Ms. Lang was the supervisory special agent for Squad One, the organized crime squad. Government Exhibit 34 is the memorandum from Supervisor Charlotte Lang dated October 8, 1993 summarizing the instructions with regard to procedures to follow in light of the Stanfa immunization.

To her knowledge, she has never come into possession of anything that John Stanfa might have said in the grand jury in New Jersey. She has never read the transcript of his testimony, she has never seen it, learned of its content, had access to it, or discussed it with anyone or had anyone disclose it to her. Moreover, she did not use Stanfa's immunized grand jury testimony either directly or indirectly to (1) initiate an investigation of Stanfa; (2) focus an investigation of Stanfa; (3) develop leads; (4) obtain cooperation of witnesses; (5) secure any type of search warrant or a Title III; (6) prepare for trial; (7) use in questioning any witness at trial; (8) obtain any evidence against Stanfa; and (9) disclose the contents to any witness who testified before the grand jury or at trial in this case.

With regard to federal electronic surveillance in the Stanfa case, Ms. Carter testified that Government Exhibit 85, the schedule of federal electronic surveillance, accurately reflects what was done and when. According to that exhibit, authorized electronic surveillance ended in September of 1993. Stanfa's immunized grand jury testimony in New Jersey on October 8, October 22, October 29 and November 5 of 1993 was not used in any way to obtain court authorization to conduct electronic surveillance.

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Finally, Ms. Carter is not aware that any of the federal government's evidence presented to the grand jury or presented to the Stanfa trial jury derived in any way from Stanfa's New Jersey state immunized grand jury testimony.

The eighth witness called by the government was Charlotte A. Lang, Supervisory Special Agent with the FBI. I found Ms. Lang to be a credible witness and the following facts are based on her testimony.

On July 8, 1991, Ms. Lang assumed the leadership of Squad One, which is the organized crime squad investigating the Stanfa family. As of mid-October, 1994, she was no longer the supervisor of that squad. She learned about Stanfa's immunization in the discussions she had with Joel Friedman and Bob Courtney just prior to Stanfa's appearance. Two memorandums in Government Exhibit 34 set forth various procedures to be followed. To the best of her knowledge, the procedures adopted in dealing with the Stanfa immunization were followed.

Ms. Lang also spoke personally to everybody referred to in the memorandum. Basically, she told them that there was going to be a Chinese Wall, and there would be no contacts between the FBI and the New Jersey state police, and that if the New Jersey state police attempted to give information to the FBI, the agent was to determine the source of the information first to determine whether it was tainted or untainted. If the source was tainted, the FBI would not accept the information. According to Ms. Lang, as early as September or October of 1991, a determination was made that the FBI would not be working with the New Jersey state police. It was her opinion when she first arrived in the Philadelphia division

that the New Jersey state police wanted to compete rather than to cooperate. She therefore made the determination that the FBI would not work with them and she personally advised her squad to that effect.

During the period of October 7, 1993 to November 22, 1995, New Jersey authorities did not make any suggestions to her about the strategy for investigating the Stanfa LCN family or any other investigative technique with respect to the investigation of the Philadelphia LCN family. She never read any of Stanfa's immunized testimony, never saw a transcript of it, never learned of its contents, never had access to it, never discussed the contents with anyone, nor had anyone disclose the contents of it to her. Moreover, she did not either directly or indirectly use Stanfa's New Jersey immunized grand jury testimony to (1) initiate an investigation of Stanfa; (2) focus an investigation of Stanfa; (3) develop leads; (4) obtain cooperation of witnesses; (5) secure any type of search warrant or a Title III; (6) prepare for trial; (7) use in questioning any witness at trial or before the grand jury; (8) obtain any evidence against Stanfa; and (9) disclose the contents to any witness who testified before the grand jury or at trial in this case. She is not aware of any federal government evidence that was presented to the grand jury or at the Stanfa trial which was derived in any way from Stanfa's New Jersey immunized grand jury testimony.

The ninth witness called by the government was Joel M. Friedman, Chief of the Organized Crime Division of the United States Attorney's Office and Deputy United States Attorney for the Eastern District of Pennsylvania. I found Mr. Friedman to be a credible witness and the following facts are based on his testimony.

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According to Mr. Friedman, the investigation of Philadelphia La Cosa Nostra family began in approximately 1990 and focused upon Stanfa in approximately 1991. Although Mr. Friedman did not attend the October 12, 1993 meeting, where the policy was discussed as to how to handle the Stanfa immunization problem, he had discussed with Mr. Courtney prior to the meeting what was going to take place, and then he was notified early and shown the memo that was drafted with regard to the meeting. To the best of his knowledge, the procedures set forth in Government Exhibit 37 were followed. With regard to Stanfa's New Jersey immunized testimony, Mr. Friedman never read any of it, never saw the transcript, never learned the contents of it, never had access to it, never discussed it with anyone and never had anyone disclose any of it to him. In addition, Mr. Friedman did not use Stanfa's New Jersey immunized grand jury testimony either directly or indirectly to (1) initiate an investigation of Stanfa; (2) focus an investigation of Stanfa; (3) develop leads; (4) obtain cooperation of witnesses; (5) secure any type of search warrant or a Title III; (6) prepare for trial; (7) use in questioning any witness at trial; (8) obtain any evidence against Stanfa; and (9) disclose the contents to any witness who testified before the grand jury or at trial in this case. As far as Mr. Friedman was aware, none of the evidence of the government presented to the grand jury, and none of the evidence of the government presented at trial was obtained or derived in any way from Stanfa's state immunized grand jury testimony. The government had interceptions of Stanfa before his immunity and was prepared to indict him on the basis of the evidence that it had.

Based upon his knowledge of the witnesses that the government had and based upon the knowledge of the evidence the government had, Mr. Friedman testified that, "We did not

gather either directly or indirectly evidence from the immunized testimony." (N/T June 6, 1996, p. 94).

The tenth witness called by the government was James T. Maher, Supervisory Special Agent of the FBI. During the period of October and November of 1993, Agent Maher's assignment was as supervisor of the special operations group, the surveillance squad. He first learned in early October that Stanfa had been immunized either from Special Agent Charlotte Lang or Joel Friedman. He instructed the agents assigned to the special operations group that they were to have no contact with the New Jersey state police troopers that they encountered during their surveillances. He reminded them that if they found themselves under surveillance that the state police were also conducting, they were to break off their surveillance. They were to have no communication with the troopers that they encountered except if one of them asked them what the time of day was or something like that. There was to be no exchange of information between them at all.

In October of 1994, Agent Maher became the Supervisor of the Organized Crime Squad. When he took that position, he was aware that there were controls in place to make sure that the FBI would avoid any taint from the New Jersey immunized testimony and those controls remained in effect while he was the supervisory special agent to the conclusion of the trial. He himself never read Stanfa's immunized grand jury testimony, never saw the transcript, never learned of its content, never had access to it, never discussed the contents of it with anyone and never had anyone discuss the contents with him. Agent Maher testified that the federal investigation that lead to the indictments in this case began November or December of 1990 and that Stanfa's New Jersey immunized grand jury testimony

was never either directly or indirectly used to (1) initiate an investigation of Stanfa; (2) focus an investigation of Stanfa; (3) develop leads; (4) obtain cooperation of witnesses; (5) secure any type of search warrant or a Title III; (6) prepare for trial; (7) use in questioning any witness at trial; (8) obtain any evidence against Stanfa; and (9) disclose the contents to any witness who testified before the grand jury or at trial in this case.

Agent Maher also testified that the electronic surveillance in this case began in December of 1990 and terminated in September of 1993, being completed in its entirety before Stanfa was immunized. The expert testimony that Agent Maher gave at the trial of Stanfa was based on his experience as a special agent for the FBI for longer than 25 years, and an organized crime investigator in particular for longer than 22 years. His interpretations were in no way based upon Stanfa's immunized grand jury testimony. Moreover, no suggestions or investigative needs were provided to him by the New Jersey State Police at any time in the Stanfa investigation.

The ten witnesses who have been referred to as government witnesses were the live witnesses presented at the *Kastigar* hearing by the government. In addition to that, the government produced affidavits of 35 people who participated in the investigation which lead to the charges of the United States against Stanfa. These affidavits were to the effect that the various agents who participated in the investigation of Stanfa had no knowledge of the immunized grand jury testimony of Stanfa.

The defense called one live witness, and that was Frederick B. DeVesa, presently a Judge of the Superior Court of the State

of New Jersey. I found Judge DeVesa to be a credible witness and the following facts are based on his testimony.

In or about September and October of 1993, Mr. DeVesa was Acting Attorney General of the State of New Jersey. The purpose of granting immunity to Stanfa, he testified, was to compel his testimony and to remove any privilege of self-incrimination that would attach to his testimony. The purpose of compelling his testimony was to obtain his testimony for whatever purpose it might be helpful in the criminal investigation, while at the same time providing him immunity so that the statements could not be used against him. Judge DeVesa was not privy to any assertions about the nature of the investigation thereafter or the strategy being employed or anything like that. Judge DeVesa remembers at some point being contacted by the U.S. Attorney, who indicated that he was concerned about New Jersey's moving forward with a subpoena to Mr. Stanfa because there was some ongoing investigation in his jurisdiction. As a result of this, DeVesa contacted Mr. Bozza and received assurances from him that first of all, it was necessary to subpoena Mr. Stanfa and that precautions could be taken by sealing the grand jury record so as to insure that there would never be any legal question regarding the use of his statements against him. Judge DeVesa also testified that his job as Attorney General involves his reliance very heavily on senior officials and the Director in the Division of Criminal Justice. In this particular case, Mr. Bozza was the First Assistant Attorney General and Deputy Director in the Division of Criminal Justice. He also received information from the Superintendent of State Police, and the information he received came from those people who were both very experienced and who he relied on. He was not personally involved in the grand jury investigation of Stanfa or the Stanfa

organized crime family. In fact, at the time in question here, he was not involved in any criminal proceedings on a personal basis and left those matters to his staff to handle. He never asked to read or discuss any of John Stanfa's immunized grand jury testimony, and no one ever disclosed it to him.

II. CONCLUSION WITH REGARD TO INDEPENDENT SOURCE.

When considering the vast amount of evidence uncovered by the government prior to Stanfa's testimony, as set forth in Number 32 of the Government's Proposed Findings of Fact, which finding I specifically adopt by reference thereto, I find that the government's case was based upon evidence, including that which was provided by the cooperating witnesses testimony, entirely independent of Stanfa's testimony.

From the testimony of the cooperating witnesses who testified at Stanfa's trial, it is clear that their testifying was motivated by the most common of goals — to get a lighter sentence, and not by Stanfa's testifying before a grand jury. Moreover, based upon their testimony at trial, and the testimony of government witnesses at this hearing, it is clear that the evidence of the cooperating witnesses was not directly or indirectly derived from Stanfa's immunity.

As defense counsel suggests, proof of independent source of evidence is very difficult. The large number of people involved, the interaction between investigative agencies, including the interaction between "taint team" members in New Jersey and government attorneys in Philadelphia, makes it almost inevitable that breaches in the plans to isolate Stanfa's immunized testimony would occur.

I did not overlook this argument. After all, human nature being what it is, it is always possible that someone might have breached the "Chinese Wall." But the testimony presented at the *Kastigar* hearing and the exhibits admitted at that hearing simply do not support the speculative "possibility of breach" theory. Instead, the evidence is clear that no breach occurred and that the case against Stanfa was based upon independent sources.

III. STANFA'S TESTIMONY.

On cross examination of Mr. Grove, the following took place:

BY MR. CARROLL:

Q. On the other end of it Stanfa said nothing extraordinary that warranted going out looking for a body as you used the term, corrèct?

A. Before I — I do want to answer that question and Mr. Friedman, I don't know if you want to be present when I do that.

MR. CARROLL: I think Mr. Friedman will leave.

MR. FRITCHEY: He's going.

(Pause)

THE COURT: All right. We'll note that Mr. Friedman is out of the courtroom.

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You may proceed.

A. Mr. Stanfa said nothing substantive during the grand jury. When he was asked a question of significant import he had a very convenient memory lapse.

Q. For four days, Mr. Grove, is that right?

A. That is absolutely correct.

Defense argues if not direct, there were certainly indirect consequences of Stanfa's testimony. There is no evidence of this even though the government, for purposes of argument in one part of its brief, concedes to the correctness of Stanfa's affidavit in support of his petition. I have made no such finding regarding the credibility of defendant. There is no credible evidence from the Kastigar hearing that anything defendant testified to before the grand jury was communicated to anyone (other than the taint team members), including Stanfa's lawyers.

My review of Stanfa's grand jury testimony leads me to the conclusion that John Stanfa, unlike some younger members of the mob, still abides by the code of omerta — silence.

A few examples:

Q. Are you a member of La Cosa Nostra?

A. Sir, I don't know what La Cosa Nostra is. When you read in the paper —

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Q. Mr. Stanfa, I would like a yes or no. Are you a member of La Cosa Nostra?

A. No, sir.

Q. Are you a member of any organized criminal group?

A. No, sir.

Q. Are you now or have you ever been a member of the Sicilian mafia?

A. No, sir.

AND

Q. Mr. Stanfa, let me explain something. The State is in a position to believe that you're the leader of an organized criminal group that is operating in Pennsylvania and Southern New Jersey and that group has an internal split; that one side of the split is you and people loyal to you, on the other side are people loyal to Joseph Merlino and, well, the now late Michael Ciancigalini. And my question is, isn't it true that Sergio Battaglia and Frank Martines are on the side loyal to you?

A. Sir, that question — already that question I told you different then mine. You are talking about a leader, this leader, that, I no even a leader in my house. . . .

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This is immunized testimony that I have quoted above. While it is an ever so brief example, the record of Stanfa's's grand jury testimony as a whole is a monument to one man's refusal to budge from his own code of omerta. He did not implicate himself or any other person as a participant in organized crime.

IV. CONCLUSIONS OF LAW.

Counsel for defendant has, in my opinion, pretty much adhered to that half of the tried and true adage of trial advocacy which states, "if the facts are against you, argue the law." It is the facts in this case which are clearly and convincingly against Stanfa. Those facts have been set forth in my findings and can be summarized in two categories.

First, no one in the investigation of Stanfa used Stanfa's immunized grand jury testimony to (1) initiate an investigation of Stanfa; (2) focus an investigation of Stanfa; (3) develop leads; (4) obtain cooperation of witnesses; (5) secure any type of search warrant or a Title III; (6) prepare for trial; (7) use in questioning any witness at trial; (8) obtain any evidence against Stanfa; and (9) disclose the contents to any witness who testified before the grand jury or at trial in this case. The fundamental reason that no one used the Stanfa testimony was that the so-called "taint team" of Bozza, Grove, Matthews and Simonini successfully followed the procedures to prevent that from happening. It's interest in this regard coincided with the interest of the U.S. Attorney's Office for the Eastern District of Pennsylvania which successfully established its own standards for protecting its ongoing investigation from any taint. Second, the government's case against Stanfa was totally independent of Stanfa's testimony, as previously discussed.

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What I have thus far written by way of conclusions of law should in no way diminish the seriousness of the problem raised by defendant's *Kastigar* issue. The court is faced with a very clear instance where one government offered the defendant immunity from prosecution, and five to six months after his testimony, the defendant was prosecuted by another government.

Defendant makes the following legal arguments:

(1) Absent extraordinary insulation techniques, it is a per se *Kastigar* violation to use subsequently developed evidence as there is no satisfactory way to prevent indirect use.

(2) The use of subsequently developed evidence is a per se *Kastigar* violation because the practice leads to subsequent acts, words and deeds of the target that inevitably will be the product of immunity or not wholly independently sourced. Thus, the so-called "derivative use doctrine" applies to post-immunity acts, deeds and words of Stanfa himself as well as those exposed to and possibly motivated by the immunized testimony, including friends and associates of the witness.

(3) The involvement of chief prosecutors, Friedman and Courtney, who, defense argues, "had been already . . . specifically warned by a court several years prior about reliance on the questionable methods of "encapsulation or Chinese Wall," militates against any sort of good faith defense.

(4) Even assuming that the encapsulation or Chinese Wall technique is valid, there is no *Kastigar* case where federal prosecutor proceeded forward where they were on actual notice that there was no true encapsulation.

(5) There is no reported *Kastigar* case where an investigation went forward, post immunity, with a reckless disregard of the doctrine of non-evidentiary use.

As I have intimated early, all of defendant's arguments suffer from a lack of factual support. Even if they were legally correct, they have the following shortcomings.

As to (1), I have found that insulation techniques were established and followed in this case. If any evidence was developed as a result of Stanfa's immunized testimony, which I find to be highly unlikely, the techniques employed prevented the use of that evidence directly or indirectly. I further found that no one did use his testimony directly or indirectly, and suggest that a review of Stanfa's testimony further supports that finding.

As to (2), I have found that there are no subsequent acts, words or deeds of Stanfa that motivated testimony of witnesses or friends. The only "act" of Stanfa is his appearing before the grand jury and testifying. I find no other acts, deeds or words which were communicated outside the "taint team." No one testified against Stanfa because of his appearance before the grand jury.

As to (3), I have read *United States v. Smith*, 580 F.Supp. 1418 (1984) (incorrectly cited in defendant's brief as 580 F.S. 418) and believe that it has no bearing on "any sort of good faith defense." I note that the format for the hearing that was advocated by the court in *Smith* was followed by the government in this case. (*Smith* was a pretrial hearing, however.)

As to (4), I have found no instance in this case where the federal prosecutor was on actual notice that there was no true encapsulation. The argument that there is no true encapsulation because Stanfa himself was free to discuss his testimony suggests that it is the duty of the government to muzzle the witness after his grand jury testimony. Moreover, there is no competent evidence on which to base a finding that Stanfa discussed his actual immunized testimony with anyone.

As to (5), I do not believe the characterization of the government's legal decision as reckless lends much weight to defendant's argument. Whether in this instance the government was careful or careless in the decision it made with regard to the existence or non-existence in law of the non-evidentiary use doctrine is not controlling.

With regard to the law, it is cited thoroughly in the briefs before this court. Only the area of non-evidentiary use of immunized testimony appears to be in question.

The dispute between the parties in this case arises in part from the Third Circuit decision in *United States v. Semkiw*, 712 F.2d 891 (1983). Semkiw stated the following propositions, the significance of which counsel dispute:

> The power to compel testimony from an unwilling witness is limited by the fifth amendment, and any grant of immunity must be co-extensive with the privilege against self-incrimination. Thus, the testimony compelled from a witness under immunity must leave him and the government in "substantially the same position" as if the witness had retained the right to remain silent. (Citations omitted)

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> The Organized Crime Control Act of 1970, 18 U.S.C. §§ 6001-6005, authorizes federal prosecutors to apply to a district court for an order directing a witness to answer questions. *Id.* § 6003.
>
> The Court reasoned that the statute was compatible with the privilege against self-incrimination because "[i]t prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." 406 U.S. at 453, 92 S.Ct. at 1661 (emphasis in original).

The cases in the *Kastigar* arena are by their nature fact specific. *Semkiw* was a case in which the court ordered a remand because the record was insufficient to determine whether defendant's immunity was violated and, if so, whether the violation was harmless. There simply was no issue before the *Semkiw* court as to (1) whether leaving the defendant in substantially the same position; or (2) whether the prohibition on using compelled testimony in any respect includes non-evidentiary use. "To what extent the Fifth Amendment's privilege against self-incrimination bars the nonevidentiary use of immunized testimony is a difficult question," according to *U.S. v. Serrano*, 870 F.2d 1 (1st Cir. 1989). My view is, however, that there is no need to resolve this admittedly difficult legal issue.

There are, defendant argues, three separate "uses" or "fruits" that must be examined after an immunized person is prosecuted: direct use, indirect use and non-evidentiary use, the examination as to the latter use being open to debate. In the final analysis, the *Kastigar* case itself sets forth the nature of the examination by reference to the government's burden:

A person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities. As stated in *Murphy*:

> "Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U.S. at 79 n. 18, 84 S.Ct. at 1609.
>
> This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.
>
> One raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.

Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653, 1665 (1972).

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In this case, the government has met its heavy burden. Not only has it negated taint, but it has shown that the evidence to convict Stanfa was derived from an ongoing investigation which began years before Stanfa's immunized testimony as well as evidence secured thereafter, all of which was independent of the compelled testimony.

The legitimate independent sources from which evidence was derived include, but are not limited to the following pre-immunization evidence: electronic surveillance; photographs; car searches; witness interviews; and grand jury transcripts. There is also post-immunization evidence, such as cooperating witnesses, *i.e.,* Veasey, Colletti, Bellocchi, Rebbie, and Lynch, the reports of interviews and transcript of testimony of whom make clear that the evidence derived from them is independent of Stanfa's immunized testimony.

Thus, the government has met its heavy *Kastigar* burden. It is appropriate that this burden be heavy and that my review of the hearing be a careful one. It is very serious indeed if a government reneges on its promise. When agencies of two different governments, ostensibly united in their aim of enforcing the law, clash as they did during the investigation of this case, it is extremely important that one's rights established by law are not a victim of that clash.

In this case, Stanfa's right not to have his testimony used directly, indirectly or arguably even in a non-evidentiary way was not lost. All of defense counsel's speculation to the contrary on the record of this case is guess work. The speculation has no basis in fact.

s/ Ronald L. Buckwalter
Ronald L. Buckwalter, J.